

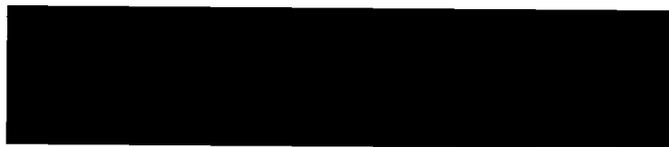
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B2

DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

JUN 01 2011



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on December 23, 2009, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of the beneficiary's sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the beneficiary's "sustained national or international acclaim" and present "extensive documentation" of his or her achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel claims that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Law

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the following ten categories of evidence.

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

¹ Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. Analysis

A. Evidentiary Criteria

This petition, filed on [REDACTED], seeks to classify the beneficiary as an alien with extraordinary ability as a violist. At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility based on his O-1 nonimmigrant status and submitted a copy of Form I-129, Petition for a Nonimmigrant Visa, along with the supporting documentation. The AAO notes that the beneficiary was approved for O-1 nonimmigrant status on [REDACTED] with a validity period from [REDACTED] to [REDACTED]. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states that "[t]he term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Further, the AAO does not find that an approval of a nonimmigrant visa mandates the approval of a similar immigrant visa. Each case must be decided on a case-by-case basis upon review of the evidence of record.

It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the alien's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of the alien, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Furthermore, as the petitioner failed to specifically identify the criteria under the regulation at 8 C.F.R. § 204.5(h)(3) that the beneficiary claimed to meet, it was not apparent from the review of the evidence to which criteria, if any, the evidence pertained. As such, the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) describing some of the criteria under the regulation at 8 C.F.R. § 204.5(h)(3). The burden is on the petitioner to establish the beneficiary's eligibility and not on the director to infer or second-guess the intended criteria. In response to the director's request for additional evidence, counsel argued:

Where the given standards do not readily apply to the alien's occupation, the regulations permit comparable evidence to establish eligibility. A Federal Court also held that a key member of a team or group is significant evidence of extra ability especially if said member is a front line player within that group effort or rendition. [The beneficiary] cited comparable evidence in his previous submission in support of his O-1 status. [The beneficiary] also cites herein below evidence to his standing within the orchestra as a "key" member of the team. The three criteria in which [the beneficiary] clearly rises to the top of his field of endeavor are:

- a) Evidence that the alien has or is to be employed in a critical or essential capacity for an organization or establishment that has a distinguished reputation;
- b) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in which the alien is engaged. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the achievements';

- c) Other comparable evidence if the standards cited in the Service's regulations do not readily apply to the alien's occupation.

Regarding item a, counsel referred to the critical or essential capacity criterion pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), a regulatory criterion reserved for an alien of extraordinary ability as a *nonimmigrant* in the fields of science, education, business, or athletics. Regarding item b, counsel referred to the significant recognition criterion pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5), a regulatory criterion reserved for an alien of extraordinary ability as a *nonimmigrant* in the arts, or 8 C.F.R. § 214.2(o)(3)(v)(B)(5), a regulatory criterion reserved for an alien of extraordinary ability as a *nonimmigrant* in the motion picture or television industry. The petitioner is seeking to classify the beneficiary as an alien of extraordinary ability in the arts as an immigrant pursuant to section 203(b)(1)(A) of the Act and not as an alien of extraordinary ability as a nonimmigrant pursuant to section 101(a)(15)(o) of the Act. Therefore, the petitioner must demonstrate that the beneficiary meets the regulatory requirements pursuant to 8 C.F.R. § 204.5(h) and not 8 C.F.R. 214.2(o). Again, although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, given the clear distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability. Regarding item c, the beneficiary's eligibility for comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) will be addressed below.

Based on the submitted documentation, the director denied the petition determining that the petitioner failed to establish eligibility for the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). If it was counsel's contention that the documentary evidence met different criteria, he never explained which criteria they were or how the evidence related to those criteria. On appeal, counsel submits additional documentary evidence and claimed the beneficiary's eligibility for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion, the display criterion, and the leading or critical role criterion.

Regarding the submission of comparable evidence, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The AAO further acknowledges that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit

A violist of high cultivation and professionalism, [the beneficiary] has the exceptional ability to combine understanding of music with a profound and deep passion in his performances. His wide range of expertise in different styles and genres has made [the beneficiary] a violist of tremendous versatility. His talents have taken him around the world, traveling extensively with [the petitioner] throughout North America, Europe, Africa, Russia, Australia, and the Middle East.

Several other examples of reference letters that discuss the beneficiary's talents but do not provide any evidence of original contributions include:

1. [REDACTED] who stated that "I myself have performed several recitals with him and have been amazed at his talents" and "[h]is techniques are most formidable and his grasp of color, texture and the sound of the viola are truly outstanding";
2. [REDACTED] who stated that "I could not ask to meet a young musician with more talent or such rare working capacity that [the beneficiary] possesses" and "[a]ccepted for his distinguished and remarkable ability to share his professional experience with other musicians, he renders essential influence on increase of their professional skill in an instrumental ensemble and in an orchestra";
3. [REDACTED] who stated that the beneficiary's "musical ability, as demonstrated by his admission to the [NOI], as well as his invitation to serve as [REDACTED] of [the petitioner], elevates him unequivocally to a musician of prominence";
4. [REDACTED] who stated that the beneficiary's "musical skills and achievements as a violist, his personal characteristics of reliability and hard work, and his being a person of extraordinary ability in conservatory music as well as a valued performer within an orchestral group are the reason that I support his application";
5. [REDACTED] who stated that the beneficiary "stands out from his peers in the level of his technical brilliance, and has demonstrated over the years a clear and pronounced ability to lead other performers in musical renditions of the highest quality"; and
6. [REDACTED] who stated that the beneficiary "is one of the most gifted violists I have come across in my entire career and his performances are always of the highest quality."

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.” It is clear from the recommendation letters that the authors hold the beneficiary in high regard for both his musical talents and personal traits. However, none of the letters indicated how the beneficiary’s skills or personal traits are original contributions of major significance to the field. Merely having a diverse skill set or being highly regarded for talent is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the beneficiary has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the beneficiary’s skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment labor certification process. *See Matter of New York State Dep’t. of Transp.*, 22 I&N Dec. 215, 221 (Commr. 1998). In addition, some of the reference letters briefly mention the beneficiary’s performances both in the United States and abroad, such as the letter from [REDACTED]. However, none of the letters indicate that the beneficiary’s performances as part of ensembles and orchestras have impacted or influenced the field as a whole, so as to demonstrate original contributions of major significance in the field. As the beneficiary is a musician, he is expected to perform before audiences at venues. There is no evidence demonstrating that the beneficiary’s performances, such as with the petitioner and [REDACTED] have significantly influenced the field as a whole rather than being limited to the entities for whom he has performed.

The petitioner also submitted a letter from [REDACTED] for the petitioner, who stated:

As far as his musical contributions to our orchestra, I have never seen anyone who can bring such richness and vitality to an entire musical group. He is the catalyst that makes our Ensemble sound like magic. In sum, he is irreplaceable in the Ensemble. His talent certainly separates him from other professional musicians without question.

Again, [REDACTED] discussed the beneficiary’s talents but failed to indicate that he has made original contributions of major significance in the field. In fact, [REDACTED] failed to identify any contributions made by the beneficiary that could be considered original. Regardless, [REDACTED] discussed the beneficiary’s talents as they related to the petitioner and not to the field as a whole. There is no indication that the beneficiary has made any original contributions of major significance in the field.

Finally, the petitioner submitted a letter from [REDACTED] who stated that the beneficiary “is an outstanding violist and I can guarantee that he will be an asset to our country” and “I have been taken with the quality of his sound and his overarching musicianship.” Again, [REDACTED] refers to the beneficiary’s talents without discussing or indicating any original contributions of major significance in the field made by the beneficiary. Furthermore, [REDACTED] mentions that the beneficiary “will be an asset to our

country [emphasis added].” A petitioner cannot file a petition under this classification based on the beneficiary’s expectation of future eligibility. Given the description in terms of future applicability and a determination that may occur at a later date, it appears from [REDACTED] letter that the beneficiary has yet to make a significant impact on the field. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm’r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176. The letter discusses far more persuasively the future promise of the beneficiary’s assets and the impact that may result from his musical work, rather than how his past musical work already qualifies as a contribution of major significance in the field. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. The assertion that the beneficiary will likely be an asset is not adequate to establish that he has made original contributions of major significance in the field. While [REDACTED] praises the beneficiary for his talents, the fact remains that any measurable impact that results from the beneficiary’s musical work will likely occur in the future.

While those familiar with the beneficiary generally describe him as “extraordinary,” “talented,” and “outstanding,” the letters contain general statements that lack specific details to demonstrate that the beneficiary has made original contributions of major significance in the field. This regulatory criterion not only requires the beneficiary to make original contributions, but also requires those contributions to be significant. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the beneficiary has made original contributions and how those original contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof.⁴ The lack of supporting documentary evidence gives the AAO no basis to gauge the significance of the beneficiary’s present contributions.

Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters of support from the beneficiary’s personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers’ statements and how they became aware of the beneficiary’s reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

⁴ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) not only requires the petitioner to demonstrate original contributions, but the petitioner must demonstrate that the original contributions have been of major significance in the field. The AAO must presume that the phrase “major significance” is not superfluous and, thus, that it has some meaning. Without additional, specific evidence showing that the beneficiary’s work has not only been original, but also unusually influential, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

In the director’s decision, he concluded that the petitioner failed to establish the beneficiary’s eligibility for this criterion because the documentary evidence failed to reflect “sustained national acclaim” of his performances. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” In accordance with *Kazarian* 596 F.3d at 1122, the beneficiary’s national or international acclaim is not relevant to meeting the plain language of the regulation. Instead, the petitioner must submit evidence establishing that the beneficiary’s work has been displayed at artistic exhibitions or showcases. While the AAO does not agree with the basis of the director’s decision in requiring national or international acclaim within this criterion, the AAO ultimately concurs with the decision of the director that the petitioner failed to establish the beneficiary’s eligibility for this criterion.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii) requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” The beneficiary is a violinist. When he is performing or playing his viola before an audience, he is not displaying his music in the same sense that a painter or sculptor displays his or her work in a gallery or museum. The beneficiary is performing his work, he is not displaying his work. In addition, to the extent that the beneficiary is a performing artist, it is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer’s art. If the AAO was to accept that a performance artist like the beneficiary meets this criterion, it would render the regulatory requirement that the beneficiary meet at least three criteria meaningless as this criterion would effectively be collapsed into the criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. This interpretation has been upheld by at least one district court. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 8-9 (finding that the AAO did not abuse its discretion in finding that a performance artist should not be considered under the display criterion). While the AAO acknowledges that a district court’s decision is not binding, the court’s reasoning indicates that the AAO’s interpretation of the regulation is reasonable.

Therefore, while the beneficiary's performances have evidentiary value for other criteria, they cannot serve to meet this criterion. Instead, as the beneficiary's performances are far more relevant to the aforementioned "leading or critical role" criterion set forth at the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(x), they will be discussed separately within the context of those criteria.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The director found that the petitioner failed to establish the beneficiary's eligibility for this criterion. Specifically, the director stated in his denial:

The support letters do not provide detail about how, exactly, this beneficiary has influenced others in his field at least on a national scale while serving in his role as violist for [the petitioner]. Neither does this information establish that his selection was the result of having gained significant recognition at least nationally. Therefore, it cannot be found that the petitioner's selection to this role, in and of itself, is indicative of, or consistent with, national or international acclaim. Thus, it cannot be concluded that the beneficiary's role is leading or critical to the extent that the duties he performed could be successfully carried out only by an individual having national or international acclaim. For this reason too, [the petitioner] cannot be deemed "distinguished" within the meaning of this regulatory element as having required an individual of national or international acclaim.

In accordance with *Kazarian* 596 F.3d at 1122, the beneficiary's national or international acclaim is not relevant to meeting the plain language of the regulation. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

At the time of the original filing of the petition [redacted] stated that "[s]ince May 1, 2008, [the beneficiary] has been working with [the petitioner] as Principal Violist." Therefore, the AAO will review the record of proceeding to determine if the beneficiary has performed in a leading or critical role as a principal violist from May 1, 2008 to November 25, 2008, the date of the filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot "consider facts that come into being only subsequent to the filing of a

petition.” *Id.* at 176. The AAO notes that the petitioner submitted several previously discussed recommendation letters that discussed the beneficiary’s offer or invitation to perform as principal violist for the petitioner. For instance, in a letter dated March 20, 2007, ██████████ stated that “the position being offered him is one that requires a person of extraordinary ability”; in a letter dated May 17, 2007, ██████████ stated that the “position of principal violist requires a musician of great skill and leadership, capable of carrying the orchestra through delicate and soulful as well as the majestic and exuberant moments of music”; and in a letter dated January 18, 2007, ██████████ stated that “[b]eing offered the principal violist chair with the [petitioner] may be just the break that [the beneficiary] needs to catapult his career.” Clearly, the letters were written prior to the beneficiary even serving as principal violist for the petitioner and do not demonstrate that that he *has performed* in a leading or critical role before the filing of the petition.

The petitioner submitted another letter from ██████████ who stated:

Viola is the crux of any orchestra. Without a viola section an orchestra section is incomplete in any of its relations. [The beneficiary] is an essential part of our orchestra. In my judgment he has no peers. He is uniquely one of a kind. He is recognized as such in all musical halls in which he has performed.

██████████ failed to indicate why the beneficiary is an “essential part” of the ensemble. While ██████████ stated that the “[v]iola is the crux of any orchestra,” the AAO is not persuaded that every violist who files an alien of extraordinary petition automatically establishes eligibility for this criterion. The submission of self-serving letters that simply indicate the job title and generally claim that the beneficiary performed in a leading or critical role is insufficient to establish eligibility for this criterion. In other words, it cannot be determined from the beneficiary’s job title alone that his role is leading or critical. The petitioner failed to submit, for example, documentary evidence comparing the roles of the beneficiary to the other principal musicians of various sections within the ensemble that would indicate the beneficiary’s roles were leading or critical. In fact, the petitioner failed to submit a single event program that listed the beneficiary as the principal violist for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nor is there any evidence reflecting that the beneficiary was featured or received top billing in any musical event for the petitioner consistent with the meaning of *leading* or *critical* pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). There is no documentary evidence differentiating the beneficiary from the other musicians, so as to establish that he performed in a leading or critical role for the petitioner. In fact, it appears that the beneficiary is in a far less subordinate role than ██████████ who is ██████████ and ██████████ for the petitioner.

On appeal, the petitioner submitted an additional letter from ██████████ who stated that she “agree[s] with ██████████ that the viola is the crux of an orchestra and that [the beneficiary] as a musician and as First Chair in the orchestra is irreplaceable.” Again, ██████████ fails to

offer any evidence demonstrating that the beneficiary has performed in a leading or critical role for the petitioner. Merely stating that the beneficiary is First Chair without any details describing the performed roles of the beneficiary is insufficient to demonstrate that his position is leading or critical.

Moreover, a review of the record of proceeding reflects that the petitioner submitted several event programs of the beneficiary's performances with other orchestras, ensembles, and events such as [REDACTED] the [REDACTED], the [REDACTED] the home of [REDACTED] and the [REDACTED]. Although the programs demonstrate that the beneficiary performed, they fail to reflect any evidence of leading or critical roles for any of the entities or at the events. For example, regarding [REDACTED] the beneficiary is listed as a member of the viola section along with 11 other violists. There is no evidence distinguishing the beneficiary from the other violists, as well as evidence distinguishing the beneficiary from all of the other musicians, reflecting that he performed in a leading or critical role for [REDACTED]. Furthermore, the petitioner failed to establish that they have distinguished reputations.

Without evidence establishing that the beneficiary performed in a leading or critical role, it is insufficient to simply submit documentary evidence reflecting that he performed as a violist in a concert setting. As the beneficiary is a violist, it is expected that the petitioner will perform the routine duties of a violist to perform on stage or in front of an audience. However, merely performing, even if the performance is considered noteworthy, does not equate to a leading or critical role. The petitioner failed to demonstrate that the beneficiary's roles in the performances were leading or critical.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

A review of the record of proceeding reflects that the petitioner never claimed the beneficiary's eligibility for this criterion, including on appeal. However, in the AAO's discussion of the artistic display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the AAO indicated that the petitioner's documentary evidence would be discussed as it related to this criterion.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by *box office receipts* or record, cassette, compact disk, or video *sales* (emphasis added)." In other words, this regulatory criterion requires evidence of commercial successes in the form of "box office receipts" or "sales." However, the record of proceeding reflects that the petitioner failed to submit any documentary evidence regarding the box office receipts of the beneficiary's performances. For example, there is no evidence showing that the beneficiary's performances consistently drew record crowds, were

regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature him.

Without documentary evidence reflecting the commercial successes of the beneficiary, the AAO cannot conclude that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x).

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

B. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The petitioner failed to establish that the beneficiary met any of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in the preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating the final merits determination, the AAO must look at the totality of the evidence to conclude the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner demonstrated that the beneficiary has recently been appointed as principal violist for the petitioner, that the beneficiary is a talented violist as reflected by the recommendation letters, and that the beneficiary has performed at some noteworthy venues such as at the [REDACTED] and [REDACTED]. However, the personal accomplishments of the beneficiary fall far short of establishing that he “is one of that small percentage who have risen to the very top of the field of endeavor” and that he “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a

level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

While the AAO found that the beneficiary did not meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the two articles that were submitted to demonstrate eligibility did not even mention the beneficiary, let alone published material about the beneficiary relating to his work. Notwithstanding, the submission of two articles, dated July 2, 2007 and June 30, 2008, between one and two years prior to the filing of the petition is insufficient to demonstrate the sustained national or international acclaim required for this highly restrictive classification.

Although the AAO found that the beneficiary did not meet the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the petitioner based the beneficiary's eligibility primarily on recommendation letters that praised his skills but spoke of his future potential and speculated about his future contributions. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from individuals supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Again, none of the letters submitted on behalf of the beneficiary reflected any original contributions of major significance made by him.

Moreover, while the beneficiary did not meet the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), the AAO considered the beneficiary's performances under the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and the commercial successes criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(x). The regulation at 8 C.F.R. 204.5(h)(3) requires “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and this his or her achievements have been recognized in the field of expertise.” While the petitioner submitted documentation demonstrating that the beneficiary has performed at concerts and at various venues, the petitioner failed to submit any documentation establishing that the beneficiary performed as a principal violist, much less that his performances for approximately four months garnered any critical acclaim or favorable press reviews or otherwise drew a significant level of attendance compared to other concerts in a manner consistent with sustained national or international acclaim. The lack of any supporting documentary evidence and the reliance on self-serving support letters from the petitioner do not indicate that the beneficiary is at a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”

Furthermore, the AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of the beneficiary's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section

203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that the beneficiary “is one of that small percentage who have risen to the very top of the field.” In addition, the petitioner has not demonstrated the beneficiary’s “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

In this matter, the evidence of record falls short of demonstrating the beneficiary’s sustained national or international acclaim as a violist. The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 8 C.F.R. § 204.5(h)(3) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

The AAO notes that the beneficiary’s references’ credentials are far more impressive. For example, [REDACTED] stated:

For over ten years I have been the principal cellist and soloist of both the [REDACTED] and the [REDACTED]. I received my Ph.D. at the [REDACTED] where I worked nearly for thirty years as a professor of cello and chamber ensemble. . . . As soloist of the [REDACTED] principal cellist of the [REDACTED] and TV, I have had the privilege to perform throughout Europe and was awarded the [REDACTED]’ title.

In contrast, the beneficiary relies on his position within the petitioner’s ensemble as well as his acceptance into the [REDACTED] as evidence of his recognition and acclaim. However, both the petitioning organization as well as the [REDACTED] appear to be limited to youths. The record contains numerous references to the petitioning organization as the [REDACTED] in articles and supporting material including a biography submitted with [REDACTED] letter. Similarly, information about the [REDACTED] indicates that it is only open to “young musicians” and describes the [REDACTED] as a program that “aspires to provide *students* with all the tools necessary to take up an active and fulfilling role in the unfolding future of American orchestras and their repertoire [emphasis added].” The beneficiary’s involvement and performances with age-restricted organizations do not reflect that “small percentage who have risen to the very top of the field of endeavor.” See 8 C.F.R. § 204.5(h)(2). USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at

60899.⁵ Likewise, it does not follow that a violist like the beneficiary, who has performed with youth-related and student level organizations, should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for “that small percentage of individuals that have risen to the very top of their field of endeavor.”

While the petitioner need not demonstrate that there is no one more accomplished than the beneficiary to qualify for the classification sought, it appears that the very top of his field of endeavor is far above the level he has attained. The petitioner seeks a highly restrictive visa classification for the beneficiary, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that the beneficiary’s achievements at the time of filing the petition were commensurate with sustained national or international acclaim as a violist, or that he was among that small percentage at the very top of the field of endeavor.

III. Conclusion

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary’s achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff’d*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

⁵ While the AAO acknowledge that a district court’s decision is not binding precedent, the AAO notes that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine’s ability with that of all the hockey players at all levels of play; but rather, Racine’s ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court’s reasoning indicates that USCIS’ interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.